between plaintiffs and defendants entitling plaintiffs to invoke the declaratory judgment act. *Aetna Life Ins. Co. vs. Haycorth,* 300 U. S. 227, 81 L. Ed. 617, 108 A. L. R. 1000."

And by the Circuit Court of Appeals of the Eighth Circuit in *Penn Mut. Life Ins. Co. vs. Forcier,* 103 F. (2d) 166; *Columbia Nat. Ins. Co. vs. Folke,* 89 F. (2d) 261; and that of the Fourth Circuit in *Anderson vs. Aetna Life Ins. Co.,* 89 F. (2d) 345.

Notes, 87 *A. L. R.* 1205-1250.

Reply to Petitioner's Argument.

On pages 9-11, petitioner's brief, it is argued that the act of the County Treasurer in making a sale in 1935 should be accepted as an administrative construction of the act of certification, but the County Treasurer disregarded the certifications in 1932, 1933, 1936, 1937 and 1938, so it cannot be even contended that there was a settled administrative construction of this statute, so that what was said in *Badger vs. Hoidale* (C. C. A. 8th), 88 F. (2d) 208, and *U. S. vs. Madigan,* 300 U. S. 500, cited as authority for this statement, would not apply, and this question is definitely settled against petitioner in *Sanford vs. Commissioner of Internal Revenue,* Vol. 84, L. Ed., Advance Opinions, page 53, where it is said on page 59:

"Administrative practice, to be accepted as guiding or controlling judicial decision, must at least be defined with sufficient certainty to define the scope of the decision."

And again on page 61:

"If, as we have held, we may reject an established ad

ministrative practice when it conflicts with an earlier one, and is not supported by valid reasons, see *Burnet vs. Chicago Portrait Co.*, 285 U. S. 1, 76 L. Ed. 587, 52 S. Ct. 275. We should be equally free to reject the practice when it conflicts with our own decisions."

At page 18, petitioner's brief, Section 6756 of the Revised Code of 1919 is set out, and it is argued therefrom that no informality in the warrant from the County Auditor to the County Treasurer will vitiate the proceedings taken, but no authority is cited, and none could be cited, that the total failure of the County Auditor to certify because the City Auditor had not certified to him is a mere informality, and this section does not apply to special assessments.

Petitioner, on pages 24-25, has cited *City of Winner vs. Kelley* (C. C. A. 8th), 65 F. (2d) 955, and *Grand Lodge vs. Winner*, 63 S. D. 390, 259 N. W. 278, but these cases do not help it.

The first of these cases was considered in the McLaughlin case, 75 F. (2d), on page 405 thereof, and it expressly appears from the opinion in that case on page 957 of the 65 F. (2d) that:

> "The court found that the city auditor in each year from 1922 to 1931, inclusive, had certified to the county auditor the installments of the assessments which were delinquent, for the purpose of the delinquent special assessment tax sale. * * *"

And that:

> "The statutory scheme for the levy and collection of these assessments contemplates that the city auditor shall annually certify to the county auditor all delinquent assessments, and that the county auditor shall then certify these assessments to the county treasurer, who is required to advertise and offer for sale the par-

cels of land against which the assessments are imposed. Sections 6400, 6401, 6402, 6785, 6786, 6797 of South Dakota Rev. Code 1919."

And in the *Grand Lodge vs. Winner* case, 259 N. W. 278, the Court specifically found that the City Auditor certified to the County Auditor all the delinquent assessments, he in turn to certify these assessments to the County Treasurer, etc., and that the City, having done all that it was required to do, was not liable for a deficiency in funds collected out of the special assessments.

These two cases specifically show that the Court found that under the statutory scheme of collecting special assessments the City Auditor was required to certify them to the County Auditor, and the County Auditor to the County Treasurer, so in fact they fully support the respondent's position and not the petitioner's.

The line of cases cited by counsel as to the effect of a voidable sale have no bearing whatever in this case where the sale was wholly void, and all of the cases cited by counsel had been decided prior to the McLaughlin case, and no cases are cited that in any way impair the decision of the Court in the McLaughlin and Canton cases.

On page 39, petitioner's brief, Section 1966, Rev. Code of 1919, is set out, and was identical with Section 37.1801 of the 1939 Code, so that it has remained unchanged since statehood, and was in force when the Freese and Coolsaet cases were decided by the South Dakota Court, applying Section 1967, Rev. Code of 1919, now 37.1802, S. D. C. 1939, as well as when the McLaughlin and Canton cases were decided by the Eighth Circuit Court of Appeals, so that none of these decisions can be impaired by Section 1966.

It should be borne in mind that under our statutory plan

the special assessments are levied in the name of the City and always remain the property of the City, and that they are never assigned to the holder of this class of bond, and that the holder of this class of bond has no lien upon them, a distinction that will account for every decision that we have found, which appears to be contrary in any degree to the McLaughlin and Canton cases.

So these assessment certificates are still the property of the City of Huron, and if the petitioner's argument has any merit in it, then the City could not be hurt by this judgment, because it could still collect these special assessments, but the Courts have definitely said that the respondent did not need to go into the realm of speculation as to the value of the property upon which these certificates were a lien or the amount of the general taxes which had accumulated, where, as here, the City had breached the good faith covenant to collect, contained in its bond.

Peake vs. City of New Orleans, 139 U. S. 342, is cited from on page 37, petitioner's brief, but it was clearly distinguished from the case at bar, in *New Orleans vs. Warner,* 175 U. S. 120, on pages 103 and 104 of the 44 L. Ed.

The McLaughlin case was thoroughly considered by the Circuit Court of Appeals, and carefully reconsidered in the Canton cases; it is sound law; under it each of the defaults of the City Auditor of Huron for each of the years of 1932, 1933, 1934, 1935, 1936 and 1938 was a distinct breach of the good faith clause of the bond; and here we have the additional fact that by a change in the time for redemption, in 1933, from two to four years, the holders of these bonds were seriously damaged by the failure of a legal certification in 1932, which would have made a legal basis for certification by the County Auditor to the County Treasurer, and a valid sale by him in 1932.

We respectfully submit that the writ should not be granted.

PERRY F. LOUCKS AND
ALAN L. AUSTIN,
Counsel for the Respondent,
Watertown, South Dakota.